

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of HECTOR S. SOLERO and DEPARTMENT OF THE NAVY,  
NAVAL AIR WARFARE CENTER, WEAPONS DIVISION, Point Mugu, CA

*Docket No. 97-1976; Submitted on the Record;  
Issued February 9, 2000*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's claim for consideration of the merits on August 19, 1996 and February 3, 1997 on the grounds that his requests for reconsideration were untimely filed and did not present clear evidence of error.

The Board has duly reviewed the case on appeal and finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on August 19, 1996 and February 3, 1997 on the grounds that his requests for reconsideration were untimely filed and did not present clear evidence of error.

Appellant, an electrical engineer, filed a claim on October 22, 1994 alleging that he developed an emotional condition due to factors of his federal employment. The Office denied appellant's claim by decision dated May 5, 1995, finding that he failed to establish compensable factors of employment. Appellant requested reconsideration of the Office's May 5, 1995 decision on April 9, 1996. By decision dated April 30, 1996, the Office denied appellant's April 9, 1996 request for reconsideration on the grounds that he failed to submit relevant new evidence. Appellant submitted a "Request for Merit Review" on July 27, 1996 and resubmitted evidence included in the record. By decision dated August 19, 1996, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and did not contain clear evidence of error. Appellant requested reconsideration on November 16, 1996 and made legal arguments. By decision dated February 3, 1997, the Office denied appellant's request finding that it was untimely filed and that he did not establish clear evidence of error on the part of the Office.

Section 8128(a) of the Federal Employees' Compensation Act<sup>1</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>2</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>3</sup> The Office, through regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>4</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>5</sup>

Appellant requested reconsideration on July 27 and November 16, 1996. Since appellant filed two reconsideration requests more than one year from the Office's May 5, 1995 merit decision, the Board finds that the Office properly determined that said requests were untimely.

In those cases where requests for reconsideration are not timely filed, the Board has held that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.<sup>6</sup> Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in the Office's regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of the Office.<sup>7</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>8</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>9</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</sup> This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>3</sup> *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>4</sup> 20 C.F.R. § 10.138(b)(2). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>5</sup> *Thankamma Mathews*, *supra* note 2 at 769; *Jesus D. Sanchez*, *supra* note 3 at 967.

<sup>6</sup> *Thankamma Mathews*, *supra* note 2 at 770.

<sup>7</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

<sup>8</sup> *Thankamma Mathews*, *supra* note 2 at 770.

<sup>9</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>10</sup> *Jesus D. Sanchez*, *supra* note 3 at 968.

<sup>11</sup> *Leona N. Travis*, *supra* note 9.

record and whether the new evidence demonstrates clear error on the part of the Office.<sup>12</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.<sup>13</sup> The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>14</sup>

The evidence submitted by appellant does not establish clear evidence of error as it does not raise a substantial question as to the correctness of the Office's most recent merit decision and is of insufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant's claim. The Board notes that the issue in the case is a factual question of whether appellant has substantiated the alleged factors of employment, to which he attributes his emotional condition. In his July 27, 1996 request for reconsideration, appellant resubmitted the extensive documentation provided with his April 9, 1996 request for reconsideration<sup>15</sup> and his initial claim. Material which is repetitious or duplicative of that already in the case record has no evidentiary value in establishing a claim and does not constitute a basis for reopening a case.<sup>16</sup> Appellant also provided citations to the Office's procedures and Board precedent in support of an argument that the Office should have granted merit review on April 30, 1996. Appellant requested a statement of accepted facts and medical referral. Appellant did not submit any new evidence relevant to the Office's merit denial of his claim. Appellant did not timely appeal the Office's April 30, 1996 denial of his April 9, 1996 request for reconsideration and the Board may not consider this decision.<sup>17</sup>

In support of his November 16, 1996 reconsideration request, appellant alleged that his due process rights were violated as the Office ignored its rules and regulations in denying his April 9, 1996 request for reconsideration. Appellant further stated that the Office improperly assigned the claims examiner to his request for reconsideration. Appellant's arguments do not establish clear evidence of error on the part of the Office in denying or terminating a benefit. His arguments focus on the Office's procedures in denying his timely request for

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<sup>12</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>13</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

<sup>14</sup> *Gregory Griffin*, 41 ECAB 458, 466 (1990).

<sup>15</sup> The Board's jurisdiction on appeal is limited to decisions of the Office issued within one year of the date of the appeal to the Board. 20 C.F.R. § 501.3(d)(2). The Board notes that, as appellant filed his appeal with the Board on May 1, 1997, the Board lacks jurisdiction to review the April 30, 1996 decision of the Office or the May 5, 1995 merit decision.

<sup>16</sup> See *Kenneth R. Mroczkowski*, 40 ECAB 855, 858 (1989); *Marta Z. DeGuzman*, 35 ECAB 309 (1983); *Katherine A. Williamson*, 33 ECAB 1696, 1705 (1982).

<sup>17</sup> 20 C.F.R. § 501.3(d)(2).

reconsideration. He has not submitted evidence of any substantive or procedural error on the part of the Office in denying the merits of his claim.

The decisions of the Office of Workers' Compensation Programs dated February 3, 1997 and August 19, 1996 are hereby affirmed.

Dated, Washington, D.C.  
February 9, 2000

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member